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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-422

JOSEPH A. D'AMBRA and CONSTANCE D'AMBRA,
Beneficiaries of Gregory A. D'Ambra, Deceased,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Beneficiaries of Gregory A. D'Ambra, Deceased,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners, Joseph A. D'Ambra and Constance D'Ambra, pray that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the First Circuit entered on June 7, 1973.

Opinions Below

The Opinions of the Court of Appeals and of the District Court are not yet officially reported, but are produced in Appendix A to this Petition, beginning at page A-1, *infra*.

Jurisdiction

The Opinion of the Court of Appeals was entered on June 7, 1973. This Court has jurisdiction to review the same by Writ of Certiorari under 28 U.S.C. §1254(1).

Questions Presented

1. Are State Wrongful Death Statutes presently in effect in some 12 states, which award damages based on the gross earnings of the decedent over the course of his normal life expectancy minus the personal expenses he would have incurred, reduced to present value, "punitive", and therefore not to be applied as against the United States in Federal Tort Claims Act cases?
2. Is the Rhode Island Wrongful Death Act which measures damages as above, "punitive" within the meaning of the Federal Tort Claims Act?
3. What are punitive damages under the Federal Tort Claims Act?

Statutes Involved

The statutes involved are 28 U.S.C. §2674 and R.I.G.L. §10-7-1.1. These statutes are reprinted in Appendix B hereto.

Statement of the Case

This case arose out of the death in June, 1970, of petitioners' four-year-old son. He had been run over and killed in North Providence, Rhode Island by a United States Postal Service mail truck.

Petitioners brought this action for negligence against the United States under the Federal Tort Claims Act: 28 U.S.C. § 1346(b); 28 U.S.C. §2674.

The United States District Court for Rhode Island found

that the United States was liable for the death, applied the Rhode Island Wrongful Death Act (R.I.G.L. §10-7-1.1) as the measure of damages, and entered its judgment for petitioners in the sum of $118,800.

The United States appealed to the United States Court of Appeals for the First Circuit. The Court of Appeals sustained as to liability, but vacated the award of damages on the ground that the application of the Rhode Island measure of damages "violated the immunity of the United States from liability for punitive damages". It remanded the case to the district court with the instruction that the latter "attempt to measure compensation by the loss [to the petitioners] of the companionship and society of the infant victim".

Reasons for Granting the Writ

I. The Decision of the Court of Appeals Is in Conflict With Decisions of This Court Involving the Concept of Punitive Damages.

Under the Federal Tort Claims Act, 28 U.S.C. §2674 (hereinafter "FTCA"), the United States is liable "in the same manner and to the same extent as a private individual under like circumstances". The only exception pertinent to this case is the prohibition against the award of punitive damages against the Government.

The Court of Appeals, however, refused to allow the application of the Rhode Island Wrongful Death Act as against the United States on the sole ground that it was, in the view of that Court, punitive.

Simply stated the Rhode Island Wrongful Death Statute awards the present value of the net pecuniary worth of the deceased. It does this by requiring that the trier of the fact determine the gross earnings the decedent would

have had over the course of his normal life expectancy, subtract the personal expenses that would have been incurred, and finally reduce the sum thus computed to its present value as of the date of the award.

The net sum is awarded to those persons and in those proportions essentially as personal property would pass by intestacy.

Rhode Island is one of six states whose sole or primary measure of damages in Wrongful Death cases employs this method. The other states in this category are:

North Carolina:
Caudle v. *Southern R.R.*, 242 N.C. 466, 88 S.E.2d 138 (1955); *United States* v. *Brooks*, (4th Cir., 1949) 176 F.2d 482

Tennessee:
Davidson Benedict Co. v. *Severson*, (1902) 109 Tenn. 572, 72 S.W. 967; *Elliott* v. *Felton*, (6th Cir., 1902) 119 F. 270

Connecticut:
Chase v. *Fitzgerald*, (1946), 132 Conn. 461, 45 A.2d 789

New Hampshire:
Carney v. *Concord Street R. Co.*, (1903) 72 N.H. 364, 57 A. 218

Kentucky:
C., N.O. & T.P.R. Co. v. *Lovell's Admr.*, (1910) 141 Ky. 249, 132 S.W. 569

These states are to be distinguished from those jurisdictions which seek to measure the loss to the survivors of

the decedent. These latter jurisdictions model their measures of damages on that established by Lord Campbell's Act (9 & 10 Vict. Ch. 93), which was soon after its passage held to limit recovery to the pecuniary losses suffered by the decedent's survivors. *Blake* v. *Midland Ry.*, (1852) 18 QB 93, 118 Eng. Reprint 35. In "loss to survivors" jurisdictions, Survivor A must plead and prove his particular personal economic loss, Survivor B, his, and so forth.

On the other hand, in Rhode Island and the states named above, the judicial inquiry is focused on the economic value of the life itself as it would have been to the decedent had he lived, *independent of and without regard to its value to any other person.*

Furthermore, in the following states if certain statutorily designated survivors do not exist, the damages are measured in the manner outlined by the Rhode Island statute:

Arizona:	ARS § 12-612
Mississippi:	Miss. Code § 1453
New Mexico:	N.M. Stats. § 22-20-3
Oregon:	ORS § 30.020
Virginia:	Va. Code § 8-638

This Court recognized that proposition of law as it related to the Arizona death statute in *Pheonix Ry. Co.* v. *Landis,* (1913) 231 U.S. 578, 34 S. Ct. 179, holding that the action could be for the "benefit of the estate and that it was not necessary for the plaintiff to allege or prove the existence of beneficiaries or the amount of damages suffered by them".

Under Pennsylvania law, damages in death cases include the pecuniary loss proved by the next of kin (under the Wrongful Death Act) *and* the earnings of the decedent, less cost of maintenance, reduced to present value (under

the Survival Act). *Rosenal* v. *United States*, (W.D. Penn., 1951) 94 F. Supp. 1004 *aff'd* 189 F.2d 969.

A clear statement of the distinction was made in *Scott* v. *Brogan*, (1937) 157 Ore. 549, 73 P.2d 688:

> Under Lord Campbell's Act, and similar statutes, the damages recovered belong to the designated beneficiary, and are measured by the particular person entitled to the benefit of the statute, while under our statute [where there are no surviving designated beneficiaries] they belong to the estate, and are *coextensive with the value of the life lost, without regard to its value to any particular person.* In the one case the object of the action is to recover the pecuniary loss sustained by the designated relative, and in the other the value of the life lost. . . . (emphasis supplied)

Obviously, then, the type of statute which the Court of Appeals held to be punitive is hardly unique to Rhode Island. It exists either as the sole or as a complementary measure in some eleven other states.

This Court was undoubtedly aware of the concept employed by these jurisdictions when it decided *Massachusetts Bonding & Insurance Co.* v. *United States*, (1956) 352 U.S. 128, 77 S. Ct. 186.

The majority quoted, in support of its opinion, from the legislative history of the 1947 Amendment to the FTCA:

> Since in those two states [Massachusetts and Alabama] compensatory damages are not allowed, all that is required is to amend the Federal Tort Claims Act to say that in such states compensatory damages shall be allowed. . . . It is believed that that suggestion would eliminate the discrepancy and would make the settlement of claims in those two states to be exactly

> in accord with the general rules followed in the other 46 states.... (*Massachusetts Bonding & Insurance Co., supra,* 352 U.S. at page 131)

Obviously then, the legislature intended a uniform rule in all of the states for settlement of death claims under the FTCA. Therefore, by statutory provision they followed the lead of *Erie R. Co.* v. *Tompkins,* (1937) 304 U.S. 64, 58 S. Ct. 817 in the application of state law with all the variations attendant.

The dissent, too, agreed that only the death statutes of Massachusetts and Alabama were punitive.

> The 1947 Amendment filled the gap, a very small gap, that was disclosed in the scheme formulated by the 1946 Act.
>
> The gap was the situation revealed in two of the forty-eight states, Alabama and Massachusetts. When the Federal Tort Claims Act was passed, the Death Acts of both Alabama and Massachusetts provided for assessment of the defendant's liability for damages on a punitive basis. In Alabama, however, there was no maximum limitation on the recovery, and the problem of this case—whether a recovery in excess of the statutory maximum recoverable against a private employer can be had against the United States—is therefore unique to recovery against the United States under the Massachusetts Death Act. *In filling the gap, Congress was concerned only to provide for recovery against the United States for wrongful deaths in Massachusetts and Alabama and to provide for recovery, as did the original Act, on a compensatory not a punitive basis.* (emphasis supplied) (Dissent of Justices Frankfurter, Reed, Clark and Brennan.)

(*Massachusetts Bonding & Insurance Co., supra*, 352 U.S. at page 139)

The gap has not only been reopened but widened into a chasm by the Opinion of the Court of Appeals.

The majority of this Court, however, defined the difference between "punitive" and "compensatory" damages:

> *Massachusetts Bonding & Insurance Co.* v. *United States*, (1956) 352 U.S. 128, 77 S. Ct. 186:
>
> > The standard of liability under the Massachusetts Death Act is punitive — i.e., "with reference to the degree" of culpability — not compensatory. The standard under the Tort Claims Act is "compensatory", i.e., "measured by the pecuniary injuries" resulting from the death. There is nothing in the Massachusetts law which measures the damages by "pecuniary injuries". The Massachusetts law, therefore cannot be taken to define the nature of the damages that can be recovered under the Tort Claims Act.
> >
> > "... By definition, punitive damages are based upon the degree of the defendant's culpability."

This definition is in strict accord with prior holdings of this Court.

Day v. *Woodworth*, (1851) 13 How. (54 U.S.) 363:

> It is a well established principle of the common law, that in actions of trespass and all actions of the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant,

> having in view the enormity of his offense rather than the measure of compensation to the plaintiff....
>
> In many civil actions, such as libel, slander, seduction, & c., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory.

Birdsall v. *Coolidge*, (1876) 93 U.S. 64:

> Compensatory damages and actual damages mean the same thing; that is, that the damages shall be the result of the injury alleged and proved, and that the amount awarded shall be precisely commensurate, with the injury suffered, neither more nor less....

Monongahela Navigation Co. v. *United States*, (1892) 148 U.S. 312, 13 S. Ct. 622:

> Thus, we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being *the equivalent for the injury done, and the latter imposed by way of punishment.* (emphasis supplied)

The award made by the District Court was the "equivalent for the injury done" to the decedent. It was the equivalent of the net economic value of his life. It was " 'measured by the pecuniary injuries' resulting from the death". No part of that award in any way depended on the degree of culpability of the United States or its employees.

Under *Massachusetts Bonding & Insurance Co., supra,*

compensatory damages are measured by the "pecuniary injuries resulting from the death", irrespective of who will receive the award. In the instant case, the Court of Appeals held that the question of who would receive the award would determine whether the award was punitive or compensatory.

The holding of the Court of Appeals represents a contradictory departure from the definition of punitive damages employed by this Court.

II. The Decision of the Court of Appeals Is in Conflict With That of the United States Courts of Appeal For the Third and Fourth Circuits.

In *United States* v. *Brooks*, (4th Cir., 1949) 176 F.2d 482, a Federal Tort Claims Act action was brought by an administrator for the benefit of the father and mother of the deceased minor child. The Fourth Circuit applied the state measure of damages and held that:

> ... the North Carolina Wrongful Death statutes ... [citations omitted] provide for a recovery by the administrator of "a fair and just compensation for the pecuniary injury resulting from such death", the recovery not to be assets for the payments of debts but to go to those entitled as next of kin to the distribution of the estate of the deceased.
>
> The amount recoverable under the Statute is the present pecuniary worth of the life of the deceased, to be ascertained by deducting the probable cost of his living and other expenses from the probable gross income to be derived from his own exertions based upon his life expectancy.... [citations omitted]
>
> Under the state law, the damages for the pecuniary worth of the deceased are to be ascertained by deduct-

> ing the probable cost of his own living and usual or ordinary expenses from the probable gross income derived from his own exertions based upon his life expectancy.

Similarly, the Third Circuit affirmed in 189 F.2d 969 the following methods of computation of death damages applied in *Rosenal* v. *United States,* (W.D. Penn., 1951) 94 F. Supp. 1004:

> Under the Pennsylvania Wrongful Death Acts of 1851 and 1855, the Administrator of the Estate of Bernard Rosenal is entitled to recover the funeral expenses and the pecuniary loss sustained by the next of kin as a result of the death of the decedent. . . .
>
> Under the Pennsylvania Survival Act of 1937, the Estate of the decedent is entitled to recover as damages the earnings of the decedent during his life expectancy, from his majority, less the cost of maintenance, reduced to its present value. . . .

The Third and Fourth Circuits have allowed recovery as against the United States in FTCA death cases under statutes identical to that which in this case the First Circuit has held to be punitive. The legislative intent of promoting uniformity in settlement of death claims by the use of the *Erie* doctrine is thus thwarted. As a result of the Opinion of the Court of Appeals, Wrongful Death actions in the 12 states using the Rhode Island measure have been thrown into a state of confusion.

III. This Case Presents an Important Question of Construction of the Federal Tort Claims Act.

As discussed *supra,* the holding of the Court of Appeals in this case will probably concern in every case the appli-

cation of the laws of Rhode Island, North Carolina, Tennessee, Connecticut, New Hampshire and Kentucky to the measurement of damages in death cases under the FTCA since the Opinion says that these laws are not to be applied in FTCA cases inasmuch as they do not measure the loss to the survivors. According to the definition employed by the Court of Appeals, every death statute is, by definition, punitive unless it measures the loss to the survivors. In many circumstances this procrustean definition will concern as well the application of the laws of Arizona, Mississippi, New Mexico, Oregon, Pennsylvania and Virginia in FTCA death cases.

Although the holding of the Court of Appeals in *Massachusetts Bonding & Insurance Co., supra*, concerned only the applicability of the statutorily fixed maximum award under the Massachusetts death statutes, and was consequently applicable only to FTCA death cases in Massachusetts, this Court granted certiorari to review this important question of construction of the Tort Claims Act.

Similarly, in *Hess, Admin.* v. *United States,* (1960) 361 U.S. 314, 80 S. Ct. 341, this Court granted the writ to determine the question whether the Oregon Employers' Liability Law might be invoked against the United States to recover under the FTCA for a maritime death in that state where the former statute required a higher standard of care than did that state's death act and carried no maximum limit of recovery whereas such a limit was prescribed by the latter. Again, certiorari was granted when an interpretation of the FTCA involved only the law of one state.

A *fortiori* with the laws of the number of states involved with the principle of this case, the writ should issue.

Indeed, the importance of the question goes far beyond the interpretation of the FTCA. If death statutes of the type in question are properly considered punitive then

they will not be applied in conflicts situations in other than their "home" state. The rule is well-settled: That no state follows the penal laws of another state. The *Antelope*, (1825) 10 Wheat. 66; *State of Wisconsin* v. *Pelican Ins. Co.*, (1888) 127 U.S. 265, 8 S. Ct. 1370; *Huntington* v. *Attrill*, (1892) 146 U.S. 657, 13 S. Ct. 224.

Thus, Rhode Island refused to apply the measure of damages of the Massachusetts death statute on the grounds that it was punitive. *McGrath* v. *Tobin*, (1954) 81 R.I. 415, 103 A.2d 795.

The ruling of the Court of Appeals, if left to stand, may touch actions in all of the 50 states.

Conclusion

For the foregoing reasons, petitioners urge that the petition for a writ of certiorari be granted.

Respectfully submitted,

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August 21, 1973

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 72-1205

JOSEPH A. D'AMBRA et al.,
PLAINTIFFS, APPELLEES,
v.
UNITED STATES OF AMERICA,
DEFENDANT, APELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Before COFFIN, *Chief Judge*,
ALDRICH and MCENTEE, *Circuit Judges*.

Joseph C. Johnston, Jr., Assistant United States Attorney, with whom *Lincoln C. Almond*, United States Attorney, was on briefs, for appellant.

Leonard Decof, with whom *Tobin, Decof, LeRoy & Silverstein*, *Girard R. Visconti*, and *Max Wistow*, were on briefs, for appellees.

June 7, 1973

ALDRICH, *Senior Judge*. The United States appealed from a decision of the district court for Rhode Island awarding plaintiffs $118,800. in an action under the Federal Tort Claims Act[1] (FTCA) for the death of their four-year-old son, run over and instantly killed by a mail truck in June 1970. On conflicting evidence the government disputed its liability and challenged the application of the Rhode Island Wrongful Death Act, amended since the accident, as the measure of damages. After the original hearing we concluded that we were satisfied that the finding of liability was supported and that, as the court had ruled,

[1] 28 U.S.C. § 1346(b); 28 U.S.C. §2674.

application of the latest amendment was not an instance of impermissible retroactivity, *Freeborn* v. *Smith*, 1864, 69 U.S. (2 Wall.) 160, 174-75; *Langdeau* v. *Narragansett Ins. Co.*, 1963, 96 R.I. 276, 191 A.2d 28, 30-31. We were particularly concerned, however, whether the application of the Rhode Island Act in this case violated the immunity of the United States from liability for punitive damages which was preserved by 28 U.S.C. § 2674, and on this issue set the case down for reargument.

Our question, prompted by its history and consideration of the Act as a whole, is whether Congress intended in a wrongful death case to accept liability over and above compensating the survivors to the extent of their loss; viz., if a state statute so provided, to pay an additional sum computed on some concept of the ultimate value of the estate, which, demonstrably, the survivors would never have received.

Many state statutes, although they may differ in form as to the method of computation and distribution, are, like Lord Campbell's Act, 9 & 10 Vict., c.93 (1846), the Federal Employers' Liability Act, 45 U.S.C. § 51, and the Death on the High Seas Act, 46 U.S.C. § 761, survivors' acts. Others, of which the Rhode Island act is an example, in varying degrees think of the death in terms of an economic loss to the decedent, and distribute the additional sum so computed as, in effect, a windfall to the selected beneficiaries. "Windfall" may be a crude term, but it is illustrated by the fact that the award will go by escheat to the state under the intestacy laws — in North Carolina to the state university, *see Warner* v. *Western N.C. RR.*, 1886, 94 N.C. 250 — if there are no surviving next of kin.[2]

[2] Plaintiffs argue in their brief that this is not novel, and that in feudal times this is precisely what happened, except that the crown was the inevitable beneficiary whether there were next of kin or not.

Following the statute, R.I.G.L. § 10-7-1.1, the court, on the basis of tables and expert testimony, determined the deceased child's gross earnings over his lifetime, deducted estimated personal expenses, and discounted the total to a present figure. The deductible expenses, in accordance with the Rhode Island Act, did not include expenses the child would have incurred on account of his anticipated dependents. This was explained by plaintiffs during oral argument on the basis that had decedent survived, his dependents would, in fact, have received these payments, so that they should not be deducted. But quite apart from the fact that the present plaintiffs, his parents, would not have been the hypothesized wife and children to receive such earnings,[3] this analysis points up the fact that what plaintiffs call an estate statute does not substitute, for the benefits provided by survivors' statutes, the value of the decedent's estate which might be expected to be accumulated, but results in the receipt of both.[4]

The Rhode Island legislature is free to be generous if it wishes at the expense of individuals negligent enough to cause a death in that state, for in terrorem or other purposes. Our question is whether Congress, in relaxing governmental immunity, accepted such liability.

See Smedley, Wrongful Death — Bases of the Common Law Rule, 13 Vand.L.Rev. 605 (1960). If this is relevant, we would answer that it was perhaps because of this that payment for wrongful death became unpopular and ceased, and, when revived by Lord Campbell's Act was in the form of recompensing the actual loss of the survivors and natural beneficiaries.

[3] The court did not determine the life expectancy of the parents, as it would in a survivors' statute, *see, e.g., United States* v. *Boykin*, 5 Cir., 1931, 49 F.2d 762 (Jones Act, incorporating FELA); *cf. Van Beeck* v. *Sabine Towing Co.*, 1937, 300 U.S. 342, 347, but manifestly it was less than the life, perhaps even of the projected earning period, of the deceased child.

[4] That it is euphemistic to call it an estate statute at all is revealed by the fact that the award is not subject to the debts of the estate. Thus the survivors, whoever they may happen to be, get the best of both worlds.

The FTCA had two parents. The first was the growing conscience of Congress respecting the defense of sovereign immunity. The second was dissatisfaction with the private bill remedy, unfair because of its randomness, and burdensome because of the inappropriateness of the forum. See Report of the Joint Committee on the Organization of Congress to accompany S. 2177, Sen. Rep. No. 1400, 79th Cong., 2d Sess. See generally Gottlieb, The Federal Tort Claims Act — A Statutory Interpretation, 35 Geo. L.J. 1 (1946); Note, The Federal Tort Claims Act, 56 Yale L.J. 534 (1947). The solution was a statute which transferred to the courts the duty of determining whether the negligent act was one for which Congress was willing to recompense, and, if so, to determine the damages, again to the extent that Congress was willing to pay. As to acts, there were many exceptions. *See,* in general, 28 U.S.C. § 2680. These included governmental-type acts, even though there was negligence, 28 U.S.C. § 2680(a); *Coastwise Packet Co.* v. *United States,* 1 Cir., 1968, 398 F.2d 77, *cert. denied* 393 U.S. 937; and, conversely, any act where there was no negligence, even though an individual would have been liable without fault, *Laird* v. *Nelms,* 1972, 406 U.S. 797. As to damages, the plaintiff was not to have the right to a trial by jury, 28 U.S.C. § 2402, or to pre-judgment interest or a punitive award. 28 U.S.C. § 2674.[5]

That Congress was concerned with compensating for the negligence of governmental employees is demonstrated by the case of wrongful death in the two states where civil recovery is measured exclusively by the degree of fault, and hence clearly punitive. In such event Congress undertook to compensate the survivors for their pecuniary

[5] The first paragraph of § 2674 reads: "The United States shall be liable, respecting the provision of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. . . ."

loss[6] even though the amount grossly exceeds the recovery permitted by the state against individuals. *Massachusetts Bonding & Ins. Co.* v. *United States*, 1956, 352 U.S. 128. Did Congress, conversely, intend to do more than compensate the survivors when the state statute so required?

Although by no means conclusive, we look to the Committee Report, and other references, cited in *Massachusetts Bonding*, 352 U.S. at 131, making provision for the two states having only punitive statutes,

> "Since in those two states compensatory damages are not allowed, all that is required is to amend the Federal Tort Claims Act to say that in such states compensatory damages shall be allowed . . . It is believed that that suggestion would eliminate the discrepancy and would make the settlement of claims in those two states to be exactly in accord with the general rules followed in the other 46 states . . ."

Concededly "exactly" cannot mean "exact," since some states do allow punitive damages, excluded by the previous paragraph of the Act.

With this background we turn to consider what was meant by the term "punitive" in the principal section of the Act, ante n.5. Punitive damages, whether viewed as "smart money" or as a deterrent, is that part of the award that is not compensatory; the terms are mutually exclusive. See McCormick, Damages § 77 (1935). Thus the Georgia court in *Atlantic, Valdosta & W. Ry. Co.* v. *McDilda*, 1906, 125 Ga. 468, 54 S.E. 140, speaking directly to the point, said that its wrongful death statute "is penal in that the measure of the recovery is the full value of the life of the deceased, irrespective of its real value to the

---

[6] The second paragraph of § 2674, applicable where a state statute provided *only* punitive damages, specified the federal measure of recovery as "[a]ctual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought."

person in whom the cause of action is vested." The court went on to hold that the statute was also civil, since this figure included fair compensation to the survivor, and held that the civil, rather than the shorter penal statute of limitations governed. Following this appraisal, the court in *Hartz* v. *United States*, 5 Cir., 1969, 415 F.2d 259, refused to apply the Georgia statute in an FTCA case.

Plaintiffs make a number of counter arguments. Their attempted distinction that the state court had declared its statute partially penal cannot be sound. The statute must be judged not by its language, nor the state court's characterization, but by its consequences. The application of the FTCA is a federal question.[7] *Laird* v. *Nelms*, ante; *Richards* v. *United States*, 1962, 369 U.S. 1. Secondly, plaintiffs criticize the *Hartz* court for failure to realize that under Georgia law a surviving widow is entitled to take in trust for the children. If the court did this, it is of no present relevance. Finally, plaintiffs state that the Rhode Island deductions are larger, and more rational than is the Georgia computation. That is true. It does not, however, change the principle.

Plaintiffs point out that a number of state statutes are, to a considerable degree, similar to the Rhode Island Act, and that no previous court, other than *Hartz*, has raised this question. It is true that a few courts have applied these statutes, although without apparent consideration, in cases where the decedent was an unmarried minor.[8] However, in the vast majority of cases, where the decedent had a wife and children the difference, in dollars, to the

[7] The only significance we attach to the circumstance that the Georgia court described its statute as partially penal is that state courts do not normally have occasion to consider the distinction, which, in turn, might result in the federal court not being alerted to the issue.

[8] *See, e.g.*, *United States* v. *Brooks*, 4 Cir., 1949, 176 F.2d 482; *Cronenberg* v. *United States*, E.D.N.C., 1954, 123 F. Supp. 693.

beneficiaries of so-called estate statutes and straight survivor statutes might not loom so large as to be conspicuous. Even in the case of an unmarried minor, a survivor statute has been held to allow the parents to recover more than what the decedent would have been legally obliged to give them. *See, e.g., Louisville & N. R. Co.* v. *Thomas' Adm'r,* 1916, 170 Ky. 145, 185 S.W. 840 (FELA). It must be, however, that it is difficult, without engaging in pure speculation, to make an appreciable finding in this respect when the child is so young that no pattern of filial generosity has been established. And it also must be borne in mind that even generous children, after attaining adulthood, may marry and incur substantial obligations that must take precedence. In the present case, even taking the most liberal look at the practicabilities of life and common experience, it is inconceivable that compensatory damages to the parents of a four-year-old child might approach $118,000.

In remanding for recompensation it is desirable that we express some guidance. Compensatory damages in terms of monetary loss are computable with a reasonable degree of accuracy in the case of an individual who has lived long enough to present a pattern of earnings, *See, e.g., Stanley* v. *United States,* D.Me., 1972, 347 F. supp. 1088, or at least long enough to show the characteristics from which his earnings may be anticipated. *Williams* v. *United States,* 1 Cir., 1970, 435 F.2d 804. A small child, however, presents a special problem — absent some extraordinary demonstrations there is nothing individual to go on. In the absence of evidence, how does one compute earnings, or what part of those earnings might be thought to accrue to parents? A further difficulty arises in such cases from the fact that under contemporary conditions the expenses of rearing a child may be expected to exceed any earnings during the period of minority when they would legally

belong to the parent. Yet it would seem a crass position for the government to take that by killing the child it had conferred an off-setting financial benefit upon the parents.

Various solutions have been suggested for this special type of case where no affirmative evidence exists to permit computation of monetary loss. In many, perhaps most, cases, courts or juries make more than nominal awards even though "the cost of rearing the child will far exceed any conceivable pecuniary benefits that might ever be optimistically expected of him; and damages honestly calculated on this basis could never be anything but a minus quantity." Prosser, The Law of Torts, 4th ed., § 1257 pp. 908-909. In *Hoyt* v. *United States*, 5th Cir., 1961, 286 F.2d 356, 361-62, the court resorted to the expedient of refusing to deduct from the anticipated contributions to the parents the costs of upbringing so as to enable the parents to obtain some recovery.[9] The majority of this court, facing a statutory void resulting from our holding the Rhode Island statute inapplicable as being partly punitive, prefers to fill it by a judge-made rule, hereinafter explained. The court is not altogether happy with its solution, but chooses it as the most reasonable of the available alternatives.[10]

This court, having declared the Rhode Island statute inapplicable to this tort claims suit against the government, must choose one of three courses for the district court to

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[9] This expedient is contrary to the traditional and strictly logical analysis employed elsewhere. *See, e.g., Dugas* v. *National Aircraft Corp.*, 3d Cir., 1971, 438 F.2d 1386, 1396 n. 24.

[10] The designated writer would prefer simply to play down strictures against speculative damages and permit the court to draw on its general knowledge and on such statistics as may be available as to normal expectancy. It is thus appropriate to say that the balance of the opinion, except the last paragraph, was primarily written by Chief Judge Coffin—with contributions from the rest of the panel—but it is equally fair to say that if a special rule is to be applied, this one seems the best to all of us, the majority of the panel having somewhat allayed the writer's fears by agreeing that their proposed rule is, until hopefully Congress gives further consideration, not an attempt to indicate new principles applicable to other situations.

follow on remand. Any one of these is in a sense legislation to fill a void. The first is to leave the district court to the task of strictly applying a pecuniary benefits-less-cost analysis — which would, if rigorously applied to the death of a very young child, yield a zero result. This outcome effectively nullifies not only the Rhode Island statute but also the federal legislation, which aimed only to shield the federal government from punitive recoveries, not from any recovery where negligence results in the death of an infant. The second course is to allow the district court, by blinking at costs of upreraring and speculating on earnings and contributions decades hence, to come up with a recovery satisfying an unarticulated sense of justice while paying lip service to the old common law calculus. This would be, in our view, legislation thinly concealed under the guise of traditionalism and internally inconsistent as well. The final course, which we prefer, is to set a standard which will both respond to the reality and contain such limitations as we are able to devise, recognizing that the best solution can be provided only by the Congress with the more precise tools at its command.[11]

We start with the proposition that while the measure of recovery must be compensatory to the survivors of a deceased child, it need not be only a measure of pecuniary loss.[12] But if the traditional standard of pecuniary loss

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[11] In an attempt to fill the statutory void we are aided by analogy to *Moragne* v. *State Marine Lines*, 1970, 398 U.S. 375, 408, where, in commenting upon allowable recoveries under the newly-recognized wrongful death cause of action in admiralty, the Supreme Court said that as to "particular questions of the measure of damages, the courts will not be without persuasive analogy for guidance. Both the Death on the High Seas Act [not helpful here, for the reasons stated *post*] and the numerous state wrongful death acts have been implemented with success for decades." While we recognize that admiralty may be a unique source of special dispensation, we look upon *Moragne* as not too remote a source of guidance in the situation before us.

[12] Were Rhode Island's statute wholly punitive, the second sentence of § 2674, specifying compensation measured by pecuniary loss, would

is not to be followed, how can courts, operating in a legislative vacuum, avoid a standardless, open-ended, unreviewable approach? Even though in fact the grief of parents over the bereavement of their child is most real, this element seems to us to be so limitless, so capable of spurious claims, that it, if recognized, is best left to legislatures, which can impose both floors and ceilings.[13] We make the same observation with reference to the "lost investment" theory.[14]

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apply. But this provision has been held to apply only to the statutes of Massachusetts and Alabama, linking recovery to degree of culpability. *Van Dusen* v. *Barrack*, 1964, 376 U.S. 612, 627 n. 21. Were pecuniary loss to be the measure of recovery in all Federal Tort Claims Act cases, Congress could have said so in one sentence.

Additionally, the fact that compensation under the FELA, 45 U.S.C. § 51 *et seq.*, the Jones Act, 46 U.S.C. § 688, and the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.* is limited to pecuniary loss does not dictate a similar result here. In *Michigan Central R.R.* v. *Vreeland*, 1913, 227 U.S. 59, the Supreme Court noted that the FELA was patterned after Lord Campbell's Act, which, though not containing the word "pecuniary", had been continuously interpreted as providing only for that limited type of compensation. The Jones Act, merely incorporating the FELA, utilizes the same standard. And the Death on the High Seas Act specifically refers to "fair and just compensation for the pecuniary loss." 46 U.S.C. § 762.

[13] The dangers of recognizing grief as compensable are stated in Note, *The Value of a Child*, 1972, 24 S.C.L.Rev. 86, and include the unusually high amounts which juries may award.

[14] One of the early attempts to award more than nominal damages, yet still label the recovery as somewhat pecuniary in nature, occurred in *Wycko* v. *Gnodtke*, 1960, 361 Mich. 331, 105 N.W.2d 118, where the court adopted the "lost investment" theory, under which expenses incurred in the child's upbringing prior to his death were awarded to the parents. *See also* Comment, *A Modern View of Wrongful Death Recoveries: Herein of the Infant and the Aged*, 1959, 54 N.W. L. Rev. 254; Note, *The Value of a Child*, n. 13 *ante*. While this approach has the merit of supplying some degree of measurability and some inherent upper limit, we think it fails to recognize the true loss to the parents as the destruction of the parent-child relationship with its attendant society and companionship. *Wycko* has not been followed, to our knowledge, in other jurisdictions as to the "lost investment" theory; in fact, the emphasis in Michigan has been more on the loss of society and companionship, *see Smith* v. *City of Detroit*, 1972, 388 Mich. 637, 202 N.W.2d 300, which we adopt herein. Moreover, to the extent that a proper balance might be struck by a

An equally realistic but more limited element of compensation for the loss of a minor child, capable of responsible judicial application, seems to us to lie in the loss of society and companionship of the child. Courts which have refused to award damages for grief and suffering have, sometimes under the same statute, recognized loss of companionship.[15] While conscious grief may diminish over time, the loss of a child's presence in the family, particularly during the minority years, is a real one. There is, moreover, a built-in factor which tends to be self limiting. In the case of the death of a very young child, estimates of future earnings and contributions are bound to be most speculative. All that is certain is that a substantial period of companionship during the child's minority has been lost. As the child approaches majority, the likelihood of a substantial further period of intimate association lessens at the same time as it becomes more possible to predict a pattern of earnings and contributions. A court, therefore, would tend to award greater damages for loss of society for the death of a younger child, and less for one nearer his majority. But in the latter case the court would be on surer ground in identifying the extent of pecuniary loss.

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minimum recovery (to assure a recovery for the loss of a very young child) supplemented by proof of "lost investment", such a resolution is particularly within the province of the legislature.

[15] *E.g.*, *Wardlow* v. *City of Keokuk*, Iowa, 1971, 190 N.W.2d 439; *Lockhart* v. *Besel*, Wash., 1967, 426 P.2d 605; *Fuentes* v. *Tucker*, 1947, 31 Cal.2d 1, 187 P.2d 752; *Gabriel* v. *Margah*, 1947, 37 Haw. 571. In other states where damages are limited to those "pecuniary" in nature, statutes have been interpreted so as to include loss of society and companionship within that term. *See*, *e.g.*, *Fussner* v. *Andert*, Minn., 1962, 113 N.W.2d 355; *Hall* v. *Gillins*, Ill., 1958, 147 N.E.2d 352. But whether by judicial decision or express statutory authority, it seems that a substantial number, if not a majority, of the states allow awards for the death of a child based on factors other than the traditional concept of pecuniary loss of the value of services and contemplated contribution. *See In re Sincere Navigation Corp.*, E.D. La., 1971, 329 F. Supp. 652, 656; *Graf* v. *Taggert*, 1964, 43 N.J. 303, 204 A.2d 140, 143 n. 1.

The difficulty of assessing this element of damages is not intrinsically greater than that of putting a figure on the loss of nurture, intellectual, moral and physical training which a child suffers with the loss of a parent. *United States* v. *Harue Hayashi*, 9th Cir., 1960, 282 F.2d 599, 605; *Norfolk & Western Ry.* v. *Holbrook*, 1915, 235 U.S. 625, 629. We grant that any such award will seem too high or too low to the respective parties for the very reason that monetary compensation for pain, disability, distress, and other elements of human injury, though properly awardable, *St. Louis, Iron Mtn. & Southern Ry.* v. *Craft*, 1915, 237 U.S. 648, is inescapably difficult of precise measurement. But not only does the concept of companionship generally carry with it the prospect of diminution with maturity; it would also, we have confidence, be applied by judges, just because of the large component of inexactitude, with an eye to judicial precedent in similar cases.[16] Finally, recognizing the absence of statutory restraints, we would on review not hesitate, as indeed we do not hesitate in this case, to set aside a verdict which we feel exceeds that which we deem supportable. We are not, in other words, remanding this case with the thought that our proposed rule is a road to reach the present figure.

On remand, therefore, the district court will, on the basis of such factors as the remaining period of minority and likely intimate association with the family, had the child lived, the cohesiveness of the family unit, and recoveries realized in similar cases, attempt to measure compensation by the loss of the companionship and society of the infant victim.

We reiterate that our recognition of damages for the

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[16] An example of a court analyzing in a responsible and discriminating manner the loss occasioned by the destruction, through death, of family relationships is found in *In re Sincere Navigation Corp.*, *ante*, cited with approval in *Gaudet* v. *Sea-Land Services, Inc.*, 5th Cir., 1972, 463 F.2d 1331, 1333.

loss of companionship and society of a deceased child applies only where, because a state's wrongful death statute is partially punitive, a statutory void is created under the FTCA. While the applicability of our approach is thus limited, we are all in agreement that the FTCA, in the light of the questions raised by this and other cases, needs Congressional attention to establish a clearly defined, and, since it is a federal act recognizing federal policy, possibly a uniform standard or measure of damages. In the present case, the finding of liability is affirmed; the award of damages vacated, and the court instructed to recompute compensatory damages consistently with this opinion.

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 4545

JOSEPH A. D'AMBRA

v.

UNITED STATES OF AMERICA

OPINION

March 3, 1972

PETTINE, *Chief Judge.* On June 2, 1970, Mr. Gaston J. Payette, a postal employee, while operating a mail truck in the course of his duties on Hawthorne Street, County of Providence, District of Rhode Island, struck Gregory A. D'Ambra, a four year old child, and as a proximate cause thereof death ensued, giving rise to the present controversy. Hawthorne Street is a 22-foot wide paved road in an average suburban residential neighborhood. Both sides of the street are lined by one-family houses fronted by 25-foot lawns. Paved driveways perpendicular to the street extend from the street to the sides of the houses. Hawthorne Street is uncurbed on both sides for most of its length.

At about 12:50 P.M., Mr. Payette started his deliveries at No. 1 and planned to complete the odd numbered side of the street first. After sorting the mail and placing that to be delivered on a tray abutting the front windshield, he parked his truck adjacent or near the first house, alighted, placed the mail in the provided depository, returned to his truck and drove to the next stop.

This procedure was followed for addresses 1, 3, 5 and 7. He testified that he did not see any children nor anyone else on Hawthorne Street until he reached No. 5, at which time four youngsters, of approximate ages four to eight, came to the right side of the truck asking for mail. It must be pointed out that from No. 1 to No. 20 the view is clear

and unobstructed. Mr. Payette testified that at all times he had absolute vision of all sides of his vehicle. Sliding doors on both sides of the truck extending from floor to roof were wide open, and, in addition, the vehicle was equipped with left, right and middle rear view mirrors, and a front reflector which provided a clear vision of the front of the truck to the ground. At No. 7 he parked at a slight angle on the right hand side of the street, almost opposite an unobstructed driveway 12.8 feet in width running between houses numbered 20 and 22. The testimony is that from this address, before moving his truck, he substantially followed his previous procedures, viz: told the children who had followed him from No. 5 and were now on the right hand side of the truck to stand back where he could see them; checked all his mirrors, saw no one else in the street or elsewhere and proceeded; he "... heard a bump in the back, in the rear, and then I heard somebody hollering, kids or somebody hollering. I stopped right away. I got out of the truck and I saw a child [Gregory D'Ambra] laying in the street directly in back of the truck." This youngster was not one of the four previously mentioned.

The testimony of other witnesses established that Constance D'Ambra, mother of the deceased, was at or about 12:50 P.M. visiting her next-door neighbor at No. 20 in the back yard, together with their children—six in all. Three of them were given permission to cut the front lawn and because the mower would not operate, all went to the front to check it. There the two mothers and the six children saw the mail truck at No. 1 and when it reached No. 5, five of the youngsters, including Gregory, ran to it. However, Gregory returned and started playing with one of the children in the driveway between No. 20 and 22. While the truck was parked at No. 7, Gregory ran to the street entrance of the driveway, stopped or hesitated, and ran out at or about the time Mr. Payette started to drive

the truck away from No. 7. The motion of the truck was in progress, and the left front struck Gregory. From the point where Gregory started down the driveway to the point of impact was approximately 60 feet; from the end of the driveway to the point of impact was no more than 20 feet. The line of vision between Mr. Payette and all points of the driveway was clear and unobstructed.

It must be noted at this point that Mrs. D'Ambra testified that she had no specific recollection of Gregory's following her out to the front yard, although she assumed that Gregory was nearby because of his propensity to stick to her "like glue." Mrs. D'Ambra further testified that she could not pinpoint Gregory's particular location at any time in the moments leading up to the accident and that she did not recall seeing Gregory playing in the driveway just before the accident.

The basic determinative question before the Court is whether "... on all the evidence, [Mr. Payette] drove his truck as a reasonably prudent person, under conditions that were apparent or which were ascertainable in the exercise of due care, so as to avoid hitting a child ..." who was moving toward him and "... might pass in front of his truck." *Paquin* v. *Boston & Taunton Transp. Co.*, 69 R.I. 176 (1943).

The facts of the case determine the "reasonableness" of the degree of care of the actor. In *Clarke* v. *R. I. Electric Lighting Co.*, 16 R.I. 463, at 466 (1889), the court aphoristically stated this fundamental doctrine as follows:

> "... [R]easonable care, as we understand it, is a degree of care which depends upon the circumstances and varies with them. It is such care as prudent men would ordinarily use in the circumstances which call for its use. The degree of care that would be reasonable in driving through a street in its ordinary circumstances might fall far short of being reasonable if

> the street was full of small children just let out of school. The care which would be reasonable in managing a sailboat in ordinary circumstances might not be reasonable in a gale of wind. The duty of care increases with the increase of danger."

Simply speaking, the greater the danger, the higher is the degree of care required to constitute ordinary care. *Lawton* v. *Vadenais*, 84 R.I. 116 (1956).

In *Berman* v. *King Union Co., Inc.*, 80 R.I. 181 (1953), it was stated that the care a person must exercise at any given time or place depends upon the danger reasonably to be apprehended, that is, the amount of care that any ordinary person would exercise in the same or similar circumstances.

The mise-en-scene of this pitiful accident was known to Mr. Payette—a typical suburbia complete in setting with its playing children. His testimony is pregnant with repeated assertions of continual observations. And in the instant situation, the proximity of children to his vehicle is clearly on the record. Certainly he was charged with the common knowledge that they are erratic and likely to move quickly without regard for their own safety. *Callahan* v. *Disorda*, 111 Vt. 331, 16 A.2d 179.

> "And when children are in the vicinity, much is necessarily to be expected of them which would not be looked for on the part of an adult. It may be anticipated that a child will dash into the street in the path of a car. (See citations, n. 43) ... There have been a number of 'pied piper' cases, in which street vendors of ice cream, and the like, which attract children into the street have been held liable for failure to protect them against traffic. (See citations n. 48). *Prosser, Torts*, 4th Ed. sec. 33, p. 172-173.[1]

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[1]*See McCarthy* v. *St. Paul*, 201 Minn. 276, 276 N.W. 1; *Shawley* v. *Husman*, 247 Minn. 510, 78 N.W. 2d 60; *Robb* v. *Miller*, 372 Pa. 505, 94 A.2d 734.

The Court need not articulate any further the law of negligence to resolve the liability issue at bar.

Mr. Payette was unshakable in the position that he looked and did not see anyone. Yet the uncontradicted evidence is that from the time he was at No. 1 there was in an almost direct line of vision, eight individuals on the lawn at No. 20—two mothers and six youngsters.

At No. 7 to his left, within talking distance, were the two mothers whom he claims he never saw—and in clear view Gregory was playing not more than 60 feet away —the distance he had to travel to make contact with the vehicle. By the time Payette was ready to drive away from No. 7, Gregory had approached to within 20 feet of the truck. Nevertheless, according to his own testimony, Payette said he looked and saw nothing—a diametric conflict with the physical facts and reasonably prudent conduct. It is impossible to accept that he could have looked all about him with the necessary degree of care before proceeding without seeing any of the people or to believe he would not have seen Gregory had he looked carefully.

> "It avails a plaintiff nothing to say that he looked and saw nothing at a point where, if had looked, he must have seen the oncoming vehicle. *Keenan* v. *Providence Journal Co.*, 52 R.I. 54."

Zielinski v. *Riley*, 61 R.I. 14, 18 (1938); cf. *Gardiner* v. *Romano*, 54 R.I. 348 (1934); *Gigure* v. *Yellow Cab Co.*, 59 R.I. 248 (1937).

In the absence of an explanation for failure to see, it must be ruled as a matter of law that a party had not looked when, in the face of uncontradicted evidence had he looked, he would have seen.

As to maintaining a lookout when starting a motor vehicle where children are known to be, see *Falzone* v. *Burgoyne*, 317 Mass. 493, 58 N.E. 2d 751; *Robbins* v. *Green*, 93 N.H. 384, 42 A.2d 690; *Callahan* v. *Disorda*, *supra*; *Barry* v. *Penech*, 324 Mass. 162, 85 N.E. 2d 251.

Contributory Negligence

The defendant has pleaded contributory negligence by both the deceased child and his mother. Considering first the mother, the test of her negligence is whether she exercised the amount of care that an ordinary prudent person would have exercised under the same or similar circumstances. *Berman* **v.** *King Union Co., Inc.,* **supra;** *Payne* **v.** *Zettell,* **91 R.I.228 (1960). Reasonable care of a minor child by a parent does not require constant and total supervision, and the mere fact that a child is briefly left unattended or allowed to play near a street does not, as a matter of law, establish negligence by the parent. See** *Buchanan et al.* **v.** *Belusko,* **361 Pa. 465, 65 A.2d 386 (1949);** *Hamlin* **v.** *N. H. Bragg & Sons,* **128 Me. 358, 147 A. 602 (1928). If Mrs. D'Ambra momentarily allowed her attention to stray from the youngest of her four sons, the child who habitually "stuck" to her "like glue," and this child suddenly and unexpectedly darted out into the street from the safety of a neighbor's driveway, the Court may find that Mrs. D'Ambra exercised due care. The Court must decide whether, in its opinion as trier of fact, and on the basis of all the testimony presented at trial, Mrs. D'Ambra neglected her duty of ordinary and prudent motherly care, and whether such neglect, if any, was causally related to the death of Gregory. After full consideration of the record, the Court is of the opinion that Mrs. D'Ambra was not guilty of contributory negligence.**

Even if the Court were to find contributory negligence on the part of Mrs. D'Ambra, it is by no means clear that this would operate as a bar to recovery in the instant case. The narrow question of the effect of the contributory negligence of one parent on a wrongful death action brought by both parents under Section 10-7 of the General Laws of Rhode Island, as amended 1971 (see p. 12, *infra*), has

not been answered by Rhode Island case law. Resolution of this question would require a painstaking and exhaustive analysis of two arguably inconsistent cases, *Gallo* v. *Simpson Spring Company*, 55 R.I. 411 (1935), and *Malfetano* v. *United Elec. Rys. Co.*, 58 R.I. 129 (1937). In view of the above finding of fact, however, it is not necessary for the Court to consider this issue.

As to Gregory the question is whether or not he used that degree of care which a child of four years would have exercised.

It would be presumptuous indeed for this Court to attempt any elaboration of Prosser's scholarly treatment of this area of torts. He tells us that, "The formula which has been worked out and which is customarily given to the jury, is that of 'what it is reasonable to expect of children of like age, intelligence and experience'." Prosser on Torts, Sec. 32, p. 155 (4th Ed.) Applying this rule I find no evidence in the record supporting the defendant's pleadings of contributory negligence.

Furthermore, it is my opinion, and I so find, that the evidence sharply reflects the want of due care on the part of Mr. Payette. If it had existed, he would have become aware of the decedent's peril as he came down the driveway and hesitated before crossing the street; surely he would have had an opportunity to avert the accident. Stating it in a different way—in the exercise of due care, he would have become aware of the peril and would have had a reasonable opportunity to avoid striking the deceased—he failed to exercise such care. He did not even know he struck the boy until he heard the frantic screams of the mothers. By that time he had traveled more than the length of his truck.

It is my considered opinion and I so find that the government is liable and must respond in damages.

Constitutionality of Applying the 1971 Amendments to the Rhode Island Wrongful Death Act to the Instant Case

The Rhode Island Wrongful Death Act, Chapter 10-7 of the General Laws, entitled "Death by Wrongful Act" was in effect at the time of the pendency of the present suit. During the January session 1971 of the Rhode Island General Assembly, which was prior to the present trial but subsequent to *Williams* v. *United States*, 435 F. 2d 804 (1970), the same was amended by adding certain sections setting forth a method for the determination of damages.[2]

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[2] "10-7-1. *Liability for damages for causing death.* — Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who, or the corporation which, would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony."

"10-7-2. *Action by executor or administrator — Persons benefited — Commencement of action — Minimum recovery.* — Every such action shall be brought by and in the name of the executor or administrator of such deceased person, whether appointed or qualified within or without the state, and the amount recovered in every such action shall be one-half (1/2) thereof go to the husband or widow, and one-half (1/2) thereof to the children of the deceased, and if there be no children the whole shall go to the husband or widow, and, if there be no husband or widow, to the next of kin, in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate. Provided, that every such action shall be commenced within two (2) years after the death of such person; and provided, further, whenever any person or corporation is found liable under §§ 10-7-1 to 10-7-4, inclusive, he or it shall be liable in damages in the sum of not less than five thousand dollars ($5,000)."

Amendment:

"10-7-1.1. *Pecuniary damages — How determined.* — Pecuniary damages to the beneficiaries described under 10-7-2 of this chapter and recoverable by such persons shall be ascertained as follows:

1. Determine the gross amount of the decedent's prospective income or earnings over the remainder of his life expectancy, including therein all estimated income he would probably have earned by his own exertions, both physical and mental.

It is of some significance that this Court set forth the events that in 1971, inferentially, motivated the legislature.

In wrongful death cases there developed in Rhode Island on the part of trial judges stock instructions to the jury that the measure of damages was to be determined by ascertaining the gross amount of the prospective future income or earnings of the deceased had he lived for the remainder of his life expectancy and deducting from such gross figure the amount he would have had to lay out as a producer to acquire such sum, computing such amount or expenses according to his station in life, his means and personal habits and then reducing this figure to its present value.[3]

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2. Deduct therefrom the estimated personal expenses that the decedent would probably have incurred for himself, exclusive of any of his dependents, over the course of his life expectancy.

3. Reduce the remainder thus ascertained to its present value as of the date of the award. In determining said award, evidence shall be admissible concerning economic trends, including but not limited to projected purchasing power of money, inflation and projected increase or decrease in the costs of living.

"10-7-10. *Damages not to estate — Not asset to estate.* — All damages recoverable under Chapter 10-7-1 to 10-7-4 inclusive shall be recoverable by and awarded to those beneficiaries as specified in 10-7-2 and shall not be deemed or considered damages to the estate of the decedent, nor shall they be considered in any way an asset of the estate of the decedent, nor liable to any claims against the estate of the decedent.

"10-7-11. *Applicability to pending actions.* — The provisions of this chapter shall apply to all actions for death by wrongful act pending at the time of passage.

"10-7-12. *Applicability to actions commenced after passage.* — The provisions of this chapter shall also apply to all actions for death by wrongful act commenced after passage.

"10-7-13. *Effect of invalidity of part of this act.* — If a court of competent jurisdiction shall adjudge to be invalid or unconstitutional any clause, sentence, paragraph, section or part of this chapter, such judgment or decree shall not affect, impair, invalidate or nullify the remainder of this chapter, but the effect thereof shall be confined to the clause, sentence, paragraph, section or part of this chapter so adjudged to be invalid or unconstitutional."

[3] This assertion by the court was not documented by researching the judges' charges as contained in the transcripts of all the so-called

Over the years, the Rhode Island decisional case law which developed was never in its entirety placed in a judicial crucible so as to reveal the true ceiling of recovery. In 1970, the First Circuit Court of Appeals analyzed and interrelated these various pronouncements in *Williams* v. *United States,* 435 F.2d 804 (1970), and definitively established for the first time the proper application of the Rhode Island death statute to the question of damages. *Williams* interpreted the measure of damages as a "loss to the estate" and that this means nothing more than a loss of savings.

It is significant to quote the following language from the opinion:

> "The court apparently failed to appreciate the full implications of the fact that the statute compensates only for the loss to the estate. It is in this context that it should have read the language which it quoted [*McCabe* v. *Narragansett Elec. Lighting Co.,* 1904, 26 R.I. 427, 435—reaffirmed in *Gill* v. *Laguerre,* 1931, 51 R.I. 158] that the measure is the 'prospective income or earnings, [less] what the deceased would have had to lay out as a producer . . . computing such expenses according to his station in life, his means and personal habits . . .' Under Rhode Island law all expenses must be considered to the extent that they could reasonably

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"death actions." The practice can hardly be disputed as evidenced in *Wiesel* v. *Cicerone,* 261 A.2d 889, 892 (R.I. 1970):

> "To determine the damages it is necessary, therefore, (1) to ascertain the gross amount of the decedent's prospective income or earnings, (2) to deduct what the decedent would have had to expend as a producer, computed according to his station in life, his means and his personal habits, to acquire such income or earnings, and (3) to reduce the result to present value. Dimitri v. Cienci & Son, 41 R.I. 393, 103 A. 1029, 7 A.L.R. 1336, overruling Schnable v. Providence Public Market, 24 R.I. 477, 53 A. 634; Reynolds v. Narragansett Electric Lighting Co., 26 R.I. 457, 59 A. 393; McCabe v. Narragansett Electric Lighting Co., 26 R.I. 427, 59 A. 112. See Gonyer v. Russell, 160 F.Supp. 537 (D.R.I. 1958)."

be expected to prevent an accumulated estate." At page 806.

"Admittedly the Rhode Island court, while speaking of loss to the estate, has never relied on the use of the words 'savings' or 'accumulated estate'." N. 4, p. 806.

"... the Rhode Island court stated that, suit under its statute 'should be considered as though it were brought, in behalf of the estate of the decedent, for the damage to that estate ...' *McCabe* v. *Narragansett Elec. Lighting Co.*, 1905, 27 R.I. 272, 278 ... This statement was repeated in *Dimitri* v. *Cienci & Son* [41 R.I. 393, 397]. These cases explicitly distinguished actions in other states that compensate the pecuniary losses of survivors." At page 806.

At page 807 the court pointed out that it was error not to have deducted as an ordinary and necessary living expense the "... cost of supporting the dependents that an adult male may reasonably be expected to have."

There is no legislative history to support a statement that it was the *Williams* decision that prompted the enactment of amended Chapter 10-7. However, it is the only inference that can be drawn for it significantly sets forth the deductions as "... estimated *personal* expenses that the decedent would probably have incurred for *himself, exclusive* of any of his dependents ..." (emphasis added) and it further states that the recoverable damages shall be awarded to specified beneficiaries and not be considerd damages to the estate of the decedent.

Finally, *Williams* rejected consideration of inflation by stating, "We consider such speculation inadmissible." Juxtaposing the amended statute we find it specifically provides that in determining the award, "economic trends ... inflation ... may be considered." N.2

The conclusion is inescapable that the legislature frontally attacked *Williams* by spelling out a computing method of damages contra to its holding.

In the perspective of this background, I must determine prospective or retroactive application of this amendment. This is dependent on whether or not it affects remedies or procedures as against substantive or substantial rights.

The Constitutional bar to retroactivity is the impairment of vested rights or contractual obligations under existing law and absent such objection, the cases are legion that there is no prohibition against retrospective or retroactive laws. See 10 Modern Federal Practice, 713 et seq.

> "The legislature in matters of procedure has undoubtedly the power to pass a statute affecting pending suits."

Houle v. *Lussier*, 50 R.I. 339, 147 A. 756 (1929).

> "It is not an insuperable objection to a remedial statute that it affects pending suits, if it affects them remedially, and neither violates vested rights nor impairs the obligation of contracts."

Langdeau v. *Narragansett Insurance Co.*, 96 R.I. 276, 280 (1963), citing *Grinnell* v. *Marine Guano and Oil Co.*, 13 R.I. 135, 136 (1880).

Since the legislature expressly provided for the application of this statute to ". . . all actions of death by wrongful act *pending* at the time of passage" and that "the provisions of this Chapter shall also apply to all actions of death by wrongful act commenced after passage;" and since no contractual obligations are involved the way is open for its retroactive application absent constitutional prohibition.[4] I see none — the amendment

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[4] Article 1, Section 12, Rhode Island Constitution:

"No ex post facto law, or law impairing the obligation of contracts shall be passed."

Prohibition against ex post facto laws applies to criminal cases. *Cummings* v. *Church*, 50 R.I. 71; *Manning* v. *Board of Tax Commissioners*, 46 R.I. 400.

neither impairs vested rights nor creates new obligations. The legal effect of the substantive statute remains and the amendment must be viewed as a legislative act designed to change a procedural rule of damages theretofore amorphously set forth in Rhode Island case law. In such a remedial posture it confirms that which existed and is permissible legislation subject to constitutional retroactive application.

I therefore rule that the measure of damages as set forth by the General Assembly of this State in its January, 1971 session is controlling in this case.

Damages

A variety of definitions and interpretations have been given to the word "damages." However, generally speaking in a legal sense it is nothing more than adequate compensation for injury and absent special circumstances excludes punitive awards. This is all that is offered by the questioned law. It provides only for compensation — restitution for the harm sustained. In resolving the issue there is no "slide rule" approach and this is more especially so in a so-called "death case." The very potential of human life propelled or retarded by heredity and fortuitous circumstances in the span of its existence practically demands divinatory powers from the court in the computation of damages.

At best the approach is imprecise. Yet the courts circumscribed by the limits of a finite mind have in the appellate process fashioned rules which reasonably achieve this end if judiciously applied at the trial level.

> "All that a trial judge can do is to state clearly the true ground of recovery limiting it to the probable pecuniary loss and pointing out the elements to be considered and *to permit no excessive verdict to stand.* (emphasis added)

Gill v. *Laguerre,* 51 R.I. 158, 161, citing *Hoon* v. *Beaver Valley Traction Co.,* 200 Pa. 369.

As a guide to the Court in its computation of the damages award in this case, plaintiff presented at trial extensive testimony by Dr. Richard S. Weckstein, Professor of Economics at Brandeis University. Dr. Weckstein testified as to a number of calculations he had made of Gregory D'Ambra's projected earnings, based on factual data presented earlier in the trial and instructions from plaintiff's counsel regarding the factors that are legally relevant to a determination of damages in a wrongful death action. The United States did not at the time of trial offer an expert witness of its own for purposes of rebuttal. Some time after the trial ended, the Court, feeling that it could not render the most enlightened of decisions without having a more complete and balanced body of data before it, reopened the evidence, over the objection of the plaintiff, to allow in the testimony of an expert witness for the government, Dr. Robert J. Myers, Professor of Actuarial science at Temple University. Dr. Weckstein appeared in court again at this time to rebut Dr. Myers' testimony. It is this total body of expert testimony, combined with other evidence presented at trial, which the Court will use as the basis for its calculation of an award.

It must be noted at the outset that Drs. Myers and Weckstein were able to agree on certain important points, however, their recommendations as to the size of the damages award were, surprisingly, as much as $180,000 apart. The mere fact that two so learned and eminently qualified men could, on the basis of the same body of evidence, reach such disparate conclusions gives the Court pause, and calls to mind the admonition of *Williams* v. *United States, supra,* against undue economic speculation. Nevertheless, the Court is required to apply the Rhode

Island Wrongful Death Act, amended subsequent to *Williams*, which provides for the consideration of certain economic factors. By their very nature these lend themselves to a considerable amount of speculation. The Court feels that by keeping in mind the statutory requirements and making a conscious effort to reduce this unavoidable speculation to a minimum, it can extract from the collective evidence the most reliable and pertinent data, and can thereby render a judgment which will be entirely just and reasonable under the circumstances.

The following will constitute the basic components of the computation of damages:

(1) *An $11,000 salary for Gregory D'Ambra for his first working year, 1987.* This figure, arrived at in various ways which the Court regards with varying degrees of favor, was essentially agreed to by the experts for both plaintiff and defendant. Although Dr. Myers' estimate was a few hundred dollars above this figure, the Court feels that an approximation to the nearest thousand dollars does no injustice to either party.[5]

(2) *A 4% growth-inflation rate* for purposes of projected earnings increases. Drs. Weckstein and Myers were both clearly in agreement as to this factor, and the evidence showed additionally that a 4% growth-inflation rate is widely acknowledged by members of the economic profession, including economists associated with the United States government. The Court finds no reason not to accept the 4% rate as given.

(3) *A 5% discount rate.* Dr. Weckstein proposed a 5% discount rate, and Dr. Myers countered with a suggested rate of 7%. Both experts agreed that the discount rate should be the sum of the "true" interest rate (which

[5] The $11,000 was the result of appreciating Joseph D'Ambra's $4200 earnings at age 21 in 1961, at the rate of 4% to 1987, the year in which Gregory would have attained the age of 21.

both found to be 4%) and the predicted rate of inflation. Dr. Myers urged the acceptance of a 3% inflation rate, which he had presented in his argument in support of a breakdown of the growth-inflation factor into components of 1% growth and 3% inflation. Dr. Weckstein argued that past economic history demanded that future inflation be predicted as 1% per year, and that future growth be set at 3%. In response to questioning as to the source of his figures, Dr. Weckstein cited statistical documentation of economic trends dating back as far as 1890, whereas Dr. Myers, upon similar questioning, effectively admitted that his estimates of inflation were based on relatively recent rather than long-term trends, and that his predictions of future growth reflected little more than his own personal convictions about the capacity of the United States economy to expand. The Court finds that the acceptance of Dr. Weckstein's 5% discount rate over Dr. Myers' 7% would be in keeping with *Brooks* v. *United States,* 273 F. Supp. 619 (D.S.C. 1967) (cited by the *Williams* court), a case in which *clearly established* inflationary trends were used in the projection of future earnings.

(4) *Allocation of family expenses by "straight" arithmetic averaging.* By adopting "straight" averaging, the Court rejects the methods suggested by both Dr. Weckstein and Dr. Myers. Dr. Myers allocated expenses to Gregory D'Ambra by comparing the expenses of a single adult to the total expenses of a family of six, which, the Court feels, does not yield a reasonable estimate of the fraction of total family expenses properly allocable to the head of a six-member household. Dr. Weckstein employed the accepted economic principles of "marginal pricing" to atribute to the adult Gregory as his allocable

expenses at any given time the difference between the total expenses of a family the size of Gregory's at that time and the total expenses of a family containing one less member. The Court finds this approach ill-suited to the legal requirement that the most *realistic* estimate of Gregory's actual projected expenses be obtained,[6] and accordingly rejects the "marginal" method which, admittedly, has very legitimate application in other areas. The Court finds both suggested methods more sophisticated but less adequate for the purposes of the instant case than the "natural" method of attributing to the head of a household of, for example, four members, 25% of the family expenses. In the absence of a clearly more reliable procedure, the Court feels compelled to use "straight" averaging.

(5) *Allowance for the changing size of Gregory D'Ambra's family in the allocation of expenses.* The Court recognizes that it is bound to take into consideration the dependents that Gregory D'Ambra could reasonably be expected to have,[7] but acknowledges at the same time the naivete of assuming that Gregory would have a wife and four dependent children *throughout* his entire working life. Dr. Weckstein's time — family size distribution, introduced at his second appearance in court, appears to offer an acceptable procedure for accounting for the shifting membership of the D'Ambra family.

Dr. Weckstein suggested the following projection of the

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[6] General Laws § 10-7-1.1 provides that as step 2 of the procedure for determining wrongful death damages, the court should deduct from gross earnings "the estimated personal expenses that the deceased would probably have incurred for himself, exclusive of any of his dependents, over the course of his life expectancy."

[7] Cf. Note 6, *supra*, and *Williams* v. *United States*, *supra*, at p. 807.

membership of Gregory D'Ambra's household, beginning in 1987:

Years	*Number of Years*	*Composition of Household (P=parents C=children)*	*Number in Household*
1987-1988	2	1P	1
1989-1990	2	2P	2
1991-1992	2	2P, 1C	3
1993-1994	2	2P, 2C	4
1995-1996	2	2P, 3C	5
1997-2012	16	2P, 4C	6
2013-2014	2	2P, 3C	5
2015-2016	2	2P, 2C	4
2017-2018	2	2P, 1C	3
2019-2036*	18	2P	2

* *remainder of life expectancy*

This projection finds Gregory D'Ambra living alone for the first two years of his working life, then getting married and raising a family of four children at the rate of one child every two years. Later in Gregory's working career, the children move away and the family size decreases. The procedure of adding and subtracting family members at exact two-year intervals may appear to be slightly artificial. There was no showing by Dr. Weckstein that the projection tracks exactly the actual Joseph D'Ambra family chronology to date, indeed, no evidence regarding the birth dates of the D'Ambra children appears on the record. However, the Court is mindful that the family picture of Joseph D'Ambra is to be used only as a guide to making predictions about the family of an adult Gregory D'Ambra.[8]

[8] The *Williams* court pointed out, at p. 805 that

"The Rhode Island cases involving wrongful death of minors who have not yet shown an earning capacity . . . place some emphasis upon the station and earnings of the parent."

Applying the guidelines articulated in *Gill* v. *Laquerre*, 51 R.I. 158, 161:

"We are of the opinion that the practical rule in these cases

The essential elements of the family picture of Joseph D'Ambra—four children, and family growth at reasonable rates—are reflected in the distribution, and the Court finds the distribution an acceptable alternative to the complete rejection of any consideration of changes in family size.

It may be noted that Dr. Weckstein's projection extends to the end of Gregory D'Ambra's life expectancy. In the light of the fact that, in the prediction of Gregory's lifetime earnings, income is attributed to him only over a 41.6 year working life, expenses can be deducted from income only during those 41.6 years. Accordingly, in the last row of Dr. Weckstein's projection, the figure 18 in the "Number of years" column must be changed to 9.6, reflecting the ending of Gregory D'Ambra's working life midway through the year 2028.

After setting down the basic distribution shown above, Dr. Weckstein assigned to Gregory D'Ambra his share of the family expenses during each distinct time period. Having rejected, supra, Dr. Weckstein's "marginal" percentages, the Court will substitute at this point its own "straight" percentages:

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is to bring before a jury the facts relating to the age, sex, physical, and mental characteristics of the child, . . ."

Gregory was three years and eleven months of age at the time of death, physically and mentally normal in every respect, displaying the energies and curiosity to be expected of a healthy child of such years.

". . . the position in life and earning capacity of its parents as bearing upon the conditions under which the child would probably have been reared and educated . . ."

Gill v. *Laquerre*, *supra*, at 161.

Gregory's parents are lower middle class, enjoying a good reputation and normal family life. Mr. D'Ambra presented the picture of a hard working devoted father dependably providing for his family. He entered the job market at 17 years of age and at 21 was earning approximately eighty dollars a week.

Number of Individuals in Household	*Percent of expenses Attributable to father*[9]
1	100
2	50
3	33
4	25
5	20
6	17

Dr. Weckstein's next step was to calculate a "weighted" average percentage of expenses assignable to Gregory D'Ambra, termed "weighted" because component percentages prevailing over longer periods of time figured more "heavily" in the calculation. The figuring of a weighted average is a relatively straightforward mathematical procedure, and the Court assumes, as did Dr. Weckstein at trial, that the calculation it will now set forth is reasonably self-explanatory and that each step need not be accompanied by an exhaustive narrative definition.

Number of Years (A)	*Number in Household* (B)	*Percent Attributable to Father* (C)	*Weighted Figure* (A x C)
2	1	100	200
2	2	50	100
2	3	33	66
2	4	25	50
2	5	20	40
16	6	17	272
2	5	20	40
2	4	25	50
2	3	33	66
9.6	2	50	480
TOTAL 41.6			1364

$$\text{WEIGHTED AVERAGE} = \frac{1364}{41.6} = 32.8$$

[9] Percentages are rounded to the nearest unit.

On the basis of this calculation, 32.8% of Gregory D'Ambra's total lifetime earnings must be considered expenses personally attributable to him and deductible from the damages award.[10] Interestingly enough this percentage is roughly midway between that of Dr. Weckstein and Dr. Myers.

Calculation of The Award

Having assigned values to the several variables figuring into the determination of an award, the Court is prepared to follow the 3-step procedure of Section 10-7-1.1 for the determination of the exact sum.

"1. Determine the gross amount of the decedent's prospective income or earnings over the remainder of his life expectancy. . ."

Present value as of 1987 of lifetime earnings, given $11,000 earnings in first year, work life of 41.6 years, 4% increase in earnings per year, and 5% discount rate: $367,400[11] (1)

"2. Deduct therefrom the estimated personal expenses that the decedent would probably have incurred for

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[10] The court acknowledges that it is not making use of certain testimony by Joseph D'Ambra regarding the specific amounts of selected expense items. Unfortunately, this testimony could be validly considered only in connection with equally specific testimony about the whole spectrum of D'Ambra family expenses. Such testimony was not sufficiently detailed.

The court also makes no separate deduction for income taxes, an item which the court ruled should be considered an expense, in keeping with *Brooks* v. *United States*, *supra*. However, since the 32.8% expense deduction is made from *gross* income, it may be said that this 32.8% includes the expense of income taxes.

[11] Both Dr. Weckstein and Dr. Myers performed this calculation. Unfortunately, their results did not agree; Dr. Weckstein testified to a figure of $374,000 and Dr. Myers gave a figure of $367,400. The court is not equipped to perform the calculation itself. It accepts the lower of the two figures as given by Dr. Myers who in having the benefit of Dr. Weckstein's figures beforehand, indicated he could not justify Dr. Weckstein's computation.

himself, exclusive of any of his dependents, over the course of his life expectancy."

Figure (1), above, reduced by 32.8% for expenses (multiply by .672): $246,900 [12] (2)

"3. Reduce the remainder thus ascertained to its present value as of the date of the award. . ."

Figure (2), above, reduced to present value as of 1972 at 5% discount rate (multiply by .4810): [13]

$118,800

The last figure is the amount of the damages award. Judgment shall be entered in the amount of $118,800.

(s) RAYMOND J. PETTINE
Chief Judge

[12] Amount rounded to the nearest hundred dollars.

[13] Figue obtained from Table II, p. 68, Kent & Kent, *Compound Interest and Annuity Tables*, McGraw-Hill, 1926.

APPENDIX B

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2674.

Liability of United States.—The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought in lieu thereof.

R.I.G.L. §10-7-1.1.

Pecuniary damages—How determined.—Pecuniary damages to the beneficiaries described under § 10-7-2 of this chapter and recoverable by such persons shall be ascertained as follows:

1. Determine the gross amount of the decedent's prospective income or earnings over the remainder of his life expectancy, including therein all estimated income he would probably have earned by his own exertions, both physical and mental.

2. Deduct therefrom the estimated personal expenses that the decedent would probably have incurred for himself, exclusive of any of his dependents, over the course of his life expectancy.

3. Reduce the remainder thus ascertained to its

present value as of the date of the award. In determining said award, evidence shall be admissible concerning economic trends, including but not limited to projected purchasing power of money, inflation and projected increase or decrease in the costs of living.